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KOMOCO MOTORS PTE LTD

v.

FARIDAH ABDULLAH

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COURT OF APPEAL, PUTRAJAYA
HISHAMUDIN MOHD YUNUS JCA
MAH WENG KWAI JCA
ROHANA YUSUF J
[CIVIL APPEAL NO: J-02(NCVC)(W)-1182-05-2012]

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8 APRIL 2013

CIVIL PROCEDURE: *Appeal - New evidence - Court of Appeal - Tendering of evidence at hearing of appeal - Whether evidence available during trial - Requirements under r. 7(3A)(a) Rules of the Court of*

D

Appeal 1994 - Whether satisfied

EVIDENCE: *Witness - Non-calling of witness - Documents to be tendered in court contained typographical errors - Whether clarification obtained from relevant parties - Whether relevant parties called as witnesses during trial - Whether documents can be tendered at appellate*

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stage - Rules of the Court of Appeal 1994, r. 7(3A)(a)

In the High Court, the appellant/plaintiff claimed against the respondent/defendant for specific performance of an alleged sale and purchase agreement ('SPA') executed between the parties.

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Vide the SPA, the defendant agreed to sell a piece of land ('the land') to the plaintiff. The plaintiff claimed that since it was a foreign entity, it had obtained the approval of the Foreign Investment Committee ('FIC') and the consent of the State Authority of Johor for the purpose of the purchase. The plaintiff

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submitted that although it had complied with all administrative and statutory requirements and had paid the deposit and earnest money to the defendant, the latter refused to complete the transaction. In denying the allegations, the defendant contended that the entity with which she had entered into the SPA was not

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the plaintiff but with an entity known as Komoco Investment Pte Ltd ('Komoco Investment') from whom she never received any payment whatsoever and she had considered the SPA as having lapsed. The High Court dismissed the plaintiff's claim on the grounds that: (i) the Economic Planning Unit's ('EPU') letter

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notifying the approval of the FIC contained a clerical error as to the date of the SPA; and (ii) the letter from the Director of Lands and Mines ('Director') notifying the consent of the State Authority

to the sale referred to the purchaser of the land as Komoco Holdings and not the plaintiff. In the present appeal, the plaintiff filed a notice of motion pursuant to r. 7(3A)(a) of the Rules of the Court of Appeal 1994 ('RCA') to adduce four documents at the hearing of the appeal, namely: (i) two letters from the plaintiff's solicitors to the EPU and to the Director pointing out the typographical errors in the FIC's approval and in the consent to sale concerning the date in the SPA and the purchaser's name, respectively; and (ii) two letters of reply from the abovementioned parties confirming that the said errors were indeed made. In support of the motion, the plaintiff claimed that the defendant's failure to call the EPU officers to testify, despite having enlisted their names on her list of witnesses, deprived the plaintiff the opportunity to cross-examine them in order to rectify the two clerical errors.

Held (dismissing motion with costs)
Per Hishamudin Mohd Yunus JCA delivering the judgment of the court:

(1) This was not a case where the new evidence was not available at the time of the trial but one where the plaintiff failed to exercise reasonable diligence to obtain clarification about the obvious clerical errors when it was in a position to do so well before the trial. (para 23)

(2) The legal burden was on the plaintiff to satisfy the court that the documents that it sought to tender as fresh evidence for the purpose of the appeal were not available at the trial. However, the plaintiff failed to satisfy the requirements of r. 7(3A)(a) of the RCA. The letters by EPU and the Director were respectively dated prior to the trial and were in the plaintiff's possession and were, in fact, placed in its bundle of documents at the trial. (paras 13, 17, 18 & 23).

(3) There was no explanation given by the plaintiff as to why the rectification of the clerical errors could not have been obtained from the respective authorities before the trial. The plaintiff was aware of the clerical mistakes well before the trial but did nothing to rectify them. The clarifications could have been sought before the trial if only there had been reasonable diligence on the part of the plaintiff. Although the EPU's and the Director's letters came into existence only after the conclusion of the trial, they were not new evidence that was not available to the plaintiff at the trial. (paras 19 & 21)

A **(4)** The plaintiff should have called the relevant officers from both the EPU and the Director of Lands and Mines as witnesses at the trial to seek the necessary clarifications from them about the clerical errors. These officers should have been in the plaintiff's list of witnesses. The legal obligation was on the
B plaintiff to have rectified the clerical errors when it presented its case. There was no duty on the defendant to call those witnesses just because their names were on her list of witnesses. The naming of witnesses in a party's list of witnesses gave that party the right to call those named on the
C list but not a duty to call them. (para 22)

Bahasa Malaysia *Translation Of Headnotes*

Di Mahkamah Tinggi, perayu/plaintif menuntut terhadap responden/
D defendan bagi pelaksanaan spesifik terhadap suatu perjanjian jual beli ('PJB') yang dimeterai antara pihak-pihak. Melalui PJB, defendan telah bersetuju untuk menjual sebidang tanah ('tanah tersebut') kepada plaintif. Plaintif mendakwa bahawa memandangkan ia merupakan sebuah entiti asing, ia telah pun memperolehi
E kelulusan Jawatankuasa Pelaburan Asing ('JPA') dan kebenaran pihak berkuasa Johor bagi tujuan pembelian tersebut. Plaintif berhujah bahawa walaupun ia telah mematuhi segala kehendak pentadbiran dan statutori dan telah membayar deposit dan wang cengkeram kepada defendan, defendan enggan untuk menyempurnakan
F transaksi tersebut. Dalam menafikan dakwaan-dakwaan tersebut, defendan menghujahkan bahawa entiti yang telah memasuki PJB dengannya bukanlah plaintif tetapi sebuah entiti yang dikenali sebagai Komoco Investment Pte Ltd ('Komoco Investment') di mana defendan tidak pernah mendapat sebarang bayaran
G daripadanya dan telah menganggap PJB sebagai luput. Mahkamah Tinggi menolak tuntutan plaintif atas alasan bahawa: (i) surat Unit Perancangan Ekonomi ('UPE'), yang memaklumkan kelulusan JPA, mengandungi kesilapan berkenaan tarikh PJB; dan (ii) surat daripada Pengarah Tanah dan Galian ('Pengarah'), yang
H memaklumkan kebenaran bagi jualan, telah merujuk pembeli sebagai Komoco Holdings dan bukannya plaintif. Dalam rayuan ini, plaintif memfailkan notis usul di bawah k. 7(3A)(a) Kaedah-Kaedah Mahkamah Rayuan 1994 ('KMR') untuk mengemukakan empat dokumen ketika perbicaraan rayuan, iaitu: (i) dua surat daripada
I peguamcara plaintif kepada UPE dan Pengarah yang menunjukkan kesalahan tipografikal dalam kelulusan JPA dan dalam kebenaran jualan berkenaan tarikh PJB dan nama pembeli masing-masing; dan

(ii) dua surat jawapan daripada pihak-pihak itu yang mengesahkan bahawa kesalahan-kesalahan tersebut sememangnya telah dibuat. Bagi menyokong usul, plaintif mendakwa bahawa kegagalan defendan memanggil pegawai-pegawai UPE untuk memberi keterangan, walaupun telah menyenaraikan nama-nama mereka dalam senarai saksinya, telah menafikan peluang kepada plaintif untuk menyoal balas mereka bagi memperbetulkan kesilapan perkeranian tersebut.

Diputuskan (menolak usul dengan kos)
Oleh Hishamudin Mohd Yunus HMR menyampaikan penghakiman mahkamah:

(1) Ini bukanlah kes di mana keterangan baru tidak diperolehi semasa perbicaraan tetapi suatu kes di mana plaintif telah gagal melaksanakan usaha yang munasabah untuk mendapatkan penjelasan berkenaan kesilapan perkeranian yang jelas apabila ia berada dalam kedudukan untuk berbuat sedemikian sebelum perbicaraan.

(2) Beban pembuktian di sisi undang-undang terletak pada plaintif untuk memuaskan mahkamah bahawa dokumen-dokumen yang ingin dikemukakan sebagai keterangan baru bagi tujuan rayuan ini tidak diperolehi semasa perbicaraan. Namun begitu, plaintif gagal memuaskan keperluan di bawah k. 7(3A)(a) KMR. Kedua-dua surat daripada UPE dan Pengarah masing-masing bertarikh sebelum perbicaraan dan berada dalam milikan plaintif dan juga disertakan dalam ikatan dokumen semasa perbicaraan.

(3) Tiada penjelasan diberikan oleh plaintif tentang mengapa pembetulan bagi kesilapan-kesilapan perkeranian tidak diperolehi daripada pihak-pihak berkuasa berkenaan sebelum perbicaraan. Plaintif sedar akan kesilapan-kesilapan perkeranian tersebut sebelum perbicaraan tetapi tidak berbuat apa-apa untuk memperbetulkannya. Penjelasan sepatutnya boleh diperolehi sebelum perbicaraan jika terdapat usaha munasabah daripada plaintif. Walaupun surat-surat UPE dan Pengarah wujud hanya selepas tamatnya perbicaraan, kedua-duanya bukanlah keterangan baru yang tidak mungkin diperolehi oleh plaintif semasa perbicaraan.

A **(4)** Plaintif sepatutnya memanggil pegawai-pegawai berkenaan dari UPE dan Jabatan Tanah dan Galian sebagai saksi-saksi untuk mendapatkan penjelasan yang diperlukan daripada mereka berkenaan kesilapan-kesilapan perkeranian. Pegawai-pegawai ini sepatutnya tersenarai dalam senarai saksi-saksi plaintif. B Kewajipan undang-undang terletak pada plaintif untuk membetulkan kesilapan-kesilapan perkeranian tersebut semasa membentangkan kesnya. Tiada kewajipan ke atas defendan untuk memanggil saksi-saksi tersebut hanya kerana nama mereka terdapat dalam senarai saksi-saksinya. Penamaan saksi- C saksi dalam senarai saksi-saksi sesuatu pihak memberikan pihak tersebut hak untuk memanggil kesemua yang dinamakan dalam senarai itu tetapi tidak memberi kewajipan untuk memanggil mereka.

D **Legislation referred to:**
National Land Code, s. 433B
Rules of the Court of Appeal 1994, r. 7(3A)(a)

For the appellant - Gan Teck Long; M/s Gan & Lim
For the respondent - Ng Chew Hor; M/s Ng An & Assocs

E *[Editor's note: For the High Court judgment, please see Komoco Motors Pte Ltd v. Faridah Abdullah [2013] 3 CLJ 440.]*

Reported by Najib Tamby

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JUDGMENT

Hishamudin Mohd Yunus JCA:

G **[1]** This is a notice of motion filed by the appellant/applicant to adduce the following documents as new evidence at the hearing of the appeal. The date of hearing of the appeal is yet to be fixed.

H **[2]** The documents are as follows:

(1) A letter from M/s Gan & Lim (the solicitors of the appellant/ plaintiff) dated 17 July 2012 to the Economic Planning Unit, Prime Minister's Department ('the EPU'), pointing out that the EPU's letter of 27 March 2006 notifying the approval of the I Foreign Investment Committee ('FIC') had stated the date of

the sale and purchase agreement ('the SPA') to be '24 February 2006', whereas the actual date of the SPA was 24 February 2003. The letter sought a confirmation from the EPU that there was a typographical error in the EPU's letter.

(2) A reply letter from EPU dated 9 August 2012 to M/s Gan & Lim confirming that the date as stated in the SPA was '24 February 2003' and not '24 February 2006' as stated in the EPU's letter (implying that there was a clerical error in the EPU's letter).

(3) A letter from M/s Gan & Lim dated 14 August 2012 to the Director of Lands and Mines, Johor, pointing out that the Director's letter notifying the State Authority's consent (pursuant to s. 433B of the National Land Code) dated 20 January 2009 had stated the name of their client (the appellant/plaintiff) to be 'Komoco Holdings Pte Ltd', whereas the name should have been typed 'Komoco Motors Pte Ltd'.

(4) A letter of reply dated 4 October 2012 from the Director of Lands and Mines Johor to M/s Gan & Lim confirming that there had been a typographical error and that the letter of consent was meant for 'Komoco Motors Pte Ltd' and not for 'Komoco Holdings Pte Ltd'.

[3] This application (under the motion) is made pursuant to r. 7(3A)(a) of the Rules of the Court of Appeal 1994 that states:

> **Power of Court to amend, admit further evidence, or draw inferences of fact**
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> (3A) At the hearing of the appeal further evidence shall not be admitted unless the court is satisfied that:
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> (a) at the hearing before the High Court or the subordinate court, as the case may be, the new evidence was not available to the party seeking to use it, or that reasonable diligence would not have made it so available.

[4] The respondent/defendant opposed the application.

[5] In order to appreciate the nature of the documents and the reason for the application, we need to go into the background facts.

[6] It is not disputed that the appellant/plaintiff (after this the appellant/plaintiff shall be referred to as 'the plaintiff') is a company incorporated in Singapore and that the respondent/defendant (after this the respondent/defendant shall be referred to as 'the defendant') is a Singapore citizen and is the registered owner of a piece of land in Johor Bahru.

[7] There is a legal dispute between the plaintiff and the defendant, resulting in the present writ action. The dispute is this. The plaintiff claims that the defendant had sold her land to the plaintiff by way of a sale and purchase agreement dated 24 February 2003; and that, being a foreign entity, it had obtained the approval of the Foreign Investment Committee (FIC) (an administrative requirement of the Malaysian Government imposed on foreigners desirous of owning lands in Malaysia) and the consent of the State Authority of Johor for the purpose of the purchase (a statutory requirement under s. 433B of the National Land Code imposed on foreigners desirous of owning lands in Malaysia). In its writ action for specific performance, the plaintiff complains that although it had complied with the administrative and statutory requirements, and had paid the deposit and earnest money to the defendant, yet the defendant refused to complete the sale and purchase agreement.

[8] The defendant in her defence denies ever entering into a sale and purchase agreement with the plaintiff. According to the defendant, if at all she had entered into a sale and purchase agreement in respect of the land, the entity with whom she had entered into the sale and purchase agreement was not the plaintiff but an entity known as Komoco Investment Pte Ltd, but even then she never received any payment from the purchaser (Komoco Investment Pte Ltd) and she had regarded the agreement as having lapsed.

[9] In the present case the trial was concluded on 21 March 2012 and decision was delivered on 20 April 2012.

[10] At the conclusion of the trial, the learned trial judge dismissed the plaintiff's claim. We do not have the benefit of the grounds of judgment of the learned judge as it is not exhibited in the affidavits.

[11] However, according to the plaintiff, its claim was dismissed by the High Court Judge because, firstly, the EPU's letter notifying the approval of the FIC for the sale of the land to the plaintiff contains a clerical error as to the date of the sale and purchase agreement; and, secondly, the letter of the Director of Lands and Mines, Johor, notifying the consent of the State Authority in respect of the sale contains a clerical error as to the name of the entity in respect of whom the consent was given (that is, the plaintiff). A B

[12] In urging this court to grant the motion, the position taken by the plaintiff is that it did not have the opportunity of rectifying the clerical errors at the trial because of the manner the defendant conducted the trial. The defendant had indicated in her list of witnesses that she would be calling an officer from the EPU and also an officer from the office of the Director of Lands and Mines as her witnesses; but at the trial the defendant opted not to call these witnesses. By reason of the decision of the defendant not to call these witnesses, the plaintiff was deprived of the opportunity of cross-examining these witnesses and to elicit evidence to rectify the clerical errors. C D E

[13] In the present case, the legal burden is on the appellant/plaintiff as the applicant to satisfy the court that the documents that it sought to tender as fresh evidence for the purpose of the appeal were not available at the trial. Alternatively, even if the documents were available then, they could not have been obtained prior to or at the trial, even if it had exercised reasonable diligence to procure them. F

[14] The plaintiff maintains that it has duly complied with the requirements of r. 7(3A)(a) of the Rules of the Court of Appeal 1994. G

[15] Firstly, the plaintiff contends that the EPU's letter (confirming the clerical error pertaining to the date) is dated 9 August 2012 and the director's letter (confirming the clerical error pertaining to the name) is dated 4 October 2012, meaning that both letters came into existence only after the date of the High Court decision, that is, 20 April 2012. Thus the plaintiff argued that these two letters were not available at the time of the trial. H I

[16] Secondly, there is the plaintiff's alternative argument. Even if the rectification of the clerical errors could have been done by the plaintiff at the trial, the failure on the part of the plaintiff to do so was due to the 'fault' of the defendant herself: the defendant chose not to call the officers from the EPU and the director's office, despite having listed these officers in her list of witnesses, thus depriving the plaintiff the opportunity of cross-examining the witnesses.

[17] In our judgment, the plaintiff has failed to satisfy the requirements of r. 7(3A)(a) of the Rules of the Court of Appeal.

[18] It is true that, as we have just said, the EPU's letter is dated 9 August 2012 and that the letter from the Director of Lands and Mines ('the director's letter') is dated 4 October 2012, meaning that these letters came into existence only after the date of the conclusion of the trial (21 March 2012; and decision delivered on 20 April 2012). But this is because the plaintiff's solicitors wrote to the EPU (pointing out the error as to the date of the SPA) only on 17 July 2012, and to the Director of Lands and Mines (pointing out the error as to the name of the plaintiff) only on 14 August 2012. It is to be recalled that the EPU's letter notifying the FIC's approval is dated 27 March 2006, and that the director's letter notifying the State Authority's consent (for the transfer of the land to the plaintiff, a foreign entity) was dated 20 January 2009; and that both these letters were, prior to the trial, in the possession of the appellant and in fact placed in the 'plaintiff's bundle of documents'.

[19] It is significant to note that there is no explanation by the plaintiff as to why the rectification as to the clerical errors could not have been obtained from the respective authorities much earlier before the trial.

[20] The plaintiff's only explanation for not seeking the clarification about the clerical errors before the trial or at the trial is that the defendant had indicated in her list of witnesses that she would be calling the relevant officers from the EPU and from the office of the Director of Lands and Mines as the defendant's witnesses; but, then, at the trial the defendant opted not to call these witnesses; thus the plaintiff was deprived of the opportunity of cross-examining these witnesses and to get their confirmation as to the clerical errors.

[21] With respect, we are unable to accept this reasoning. First, a question that arises is this: why is it that the inquiries about the clerical errors were not made by the plaintiff to the EPU and to the Director of Lands and Mines much earlier before the trial? After all, the plaintiff was aware of the clerical errors well before the trial. The plaintiff's affidavit in support does not address this pertinent question. Thus the clarifications could have been sought before the trial; if only there had been reasonable diligence on the part of the plaintiff. In our judgment, although the EPU's and the director's letters (on the clarifications as to the clerical errors) came into existence only after the conclusion of the trial, still we do not consider them to be new evidence that were not available to the plaintiff at the trial. On our part, for the purpose of r. 7(3A)(a), we are not only concerned as to when the letters came into existence. We also look at the contents of the letters. The new evidence is in the contents of the letters. The contents concerned the confirmation of the existence, and the rectification, of clerical mistakes. But the fact remains that the clerical mistakes as to the date (of the SPA) and name (of the plaintiff) existed the very moment the letters of approval/consent were issued by the relevant authorities (27 March 2006 for the FIC's approval; and 20 January 2009 for the State Authority's consent). They are, therefore, not newly discovered clerical mistakes. To repeat as to what we have earlier stated, the plaintiff was aware of the clerical mistakes well before the trial. But it did nothing to rectify the clerical mistakes.

[22] At the very least, the plaintiff should have called the relevant officers from the EPU and from the office of the Director of Lands and Mines as witnesses at the trial to seek the necessary clarifications from them about the clerical errors; meaning that these officers should have been in the plaintiff's list of witnesses. But it failed to do so. And they are not even in the plaintiff's list of witnesses. In our judgment, there is no duty on the part of the defendant to call witnesses from the EPU and from the director's office just because the names of these witnesses happened to be on the defendant's list of witnesses. The naming of witnesses in a party's list of witnesses gives that party the right to call the witnesses so listed; but it does not impose a duty on that party to call any of the witnesses so named. On the contrary, the legal obligation is on the part of the plaintiff (who was in possession of

A the letters of approval/consent and was aware of the clerical errors) to rectify the clerical errors when presenting its case. Therefore, with respect, the plaintiff's argument about the defendant's failure to 'abide' (to quote the very word used by the plaintiff in its supporting affidavit) by her list of witnesses is
B misconceived and devoid of any merit whatsoever.

[23] In conclusion we hold that this is not a case of where the new evidence was not available at the time of the trial. Instead, this is a case where the plaintiff had not exercised reasonable
C diligence to obtain the clarification about the obvious clerical errors from the EPU and the director's office, when it was in a position to do so well before the trial; and hence the requirements of r. 7(3A)(a) has not been satisfied. Therefore, we cannot allow the admission of the new evidence for the purpose of the hearing of
D the appeal.

[24] The motion must, therefore, be dismissed with costs.

(Motion dismissed with costs of RM2,500)

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